

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OFFICE OF SECRETARY

In the Matter of

Application by SBC Communications Inc.
Southwestern Bell Telephone Company,
and Southwestern Bell Communications
Services, Inc. d/b/a Southwestern Bell Long
Distance for Provision of In-Region
InterLATA Services in Oklahoma

CC Docket No. 97-121

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

**COMMENTS OF BROOKS FIBER PROPERTIES, INC.
IN SUPPORT OF MOTION TO DISMISS AND REQUEST
FOR SANCTIONS BY THE ASSOCIATION
FOR LOCAL TELECOMMUNICATIONS SERVICES**

Pursuant to the Commission's Public Notice in this matter issued April 23, 1997,
Brooks Fiber Properties, Inc. ("Brooks")¹ submits its comments in support of the Motion
to Dismiss and Request for Sanctions filed by the Association for Local
Telecommunications Services ("ALTS").²

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¹ Brooks, through its operating subsidiaries, is a national provider of competitive local exchange services.

² ALTS is the national trade association for more than thirty facilities-based local exchange competitors, including Brooks.

The ALTS motion to dismiss raises two issues: first, whether SBC has misrepresented the facts when it alleges that "Brooks Fiber. . .offers service to residential customers. . ." in the State of Oklahoma (SBC Brief at 11); and, second, whether SBC can pursue a Track B filing for Oklahoma while interconnection arrangements are in the process of being implemented.³

The first matter is one to which Brooks can speak from direct knowledge, since it is its operations in Oklahoma which are at issue. As stated in the ALTS motion, Brooks has not offered, and does not offer at this time, residential local exchange service in Oklahoma.⁴ The only activity in which Brooks is currently engaged which is in any way related to the residential market in Oklahoma is a test of four circuits of resold Southwestern Bell Telephone Company ("SWBT") local exchange service (i.e., SWBT provided dial-tone) provisioned to the homes of Brooks employees. The sole purpose of the test is to identify and troubleshoot any problems in the SWBT and Brooks resale support and ancillary services systems. The test is on-going, but has not been expanded beyond the original four employees. Brooks is not marketing residential service to the public in Oklahoma at this time.

³ These comments are expressly limited to the issues specified in the Commission's April 23, 1997 Public Notice. No concessions are intended or should be construed with respect to other defects with SBC's Section 271 application.

⁴ The ALTS motion is supported on this point by the affidavit of John C. Shapleigh, an executive officer of Brooks.

Brooks has not commenced a general offering of residential local exchange service in Oklahoma. This fact has been conveyed by Brooks to SWBT. In a March 4, 1997 letter,⁵ Brooks responded to specific inquiries from SWBT regarding the status of Brooks' operations in Oklahoma. With respect to the question of residential service, Brooks stated flatly, "Brooks has not presently commenced a general offering of local telephone exchange service to residential customers." Brooks also specifically noted that its only serving arrangements with residential customers in Oklahoma consisted of four customers on a test basis. Brooks confirmed these facts in comments filed in the Oklahoma Corporation Commission's state investigation regarding SWBT §271 issues. (See, Brooks Initial Comments at 2, Oklahoma Corporation Commission Docket No. 97-0000064). These facts were confirmed again during cross-examination at the April 15, 1997 evidentiary hearing in the same docket. (See Transcript at 63-64).⁶

SBC must, therefore, contend that the existence of these four test circuits to Brooks employees constitutes the provision of residential local exchange service in Oklahoma. That contention is so completely without merit so as to be rightly characterized as frivolous. To construe this handful of test circuits to Brooks' employees as constituting "residential service" for purposes of Section 271 (c)(1)(A) would make a mockery of the clear Congressional preference for significant and established operations

⁵ Brooks' March 4 letter to SBC is included as Attachment A to the ALTS Motion to Dismiss.

⁶ At no time prior to the April 15 evidentiary hearing did SBC seek further explanation from Brooks regarding the nature and purpose of these residential test circuits.

of a facilities-based carrier as one of the critical threshold requirements for in-region interLATA entry by an RBOC.⁷

While this defect alone is palpable and fatal on its face to SBC's entry petition, even if one assumed arguendo that these employee test circuits somehow constitute the provision of residential service under Track A, there is absolutely no dispute regarding the fact that neither Brooks nor any other competing carrier is providing any residential "service" in Oklahoma either exclusively or predominantly over its own facilities as is also required pursuant to Track A.⁸

With respect to the second issue noticed for comment, Brooks concurs in the statements and argument contained in the ALTS Motion to Dismiss that an SBC Track B filing for Oklahoma is improper on the face of the relevant uncontested facts. At a minimum, Track B is disabled once the RBOC has received an interconnection request from a competing carrier which intends to deploy its own facilities, rather than rely on resale of the RBOC's local exchange service as the primary method of competitive operations. SWBT received such an interconnection request from Brooks in March 1996, and that request ultimately resulted in a negotiated interconnection agreement which was

⁷ Brooks is a facilities-based carrier and intends to provide service in Oklahoma predominantly through the use of leased unbundled loop facilities combined with Brook's own network facilities. Due to delays in SWBT's construction of Brooks' collocation facilities in Tulsa and Oklahoma City, however, Brooks is not yet in a position to begin utilization of SWBT's unbundled loops in Oklahoma.

⁸ See SBC Brief at 11.

approved by the Oklahoma Corporation Commission in October, 1996.⁹ Once such a request is received by the RBOC in a particular state, Section 271 (c)(1)(b) provides that it has the effect of disabling a Track B petition unless the competing carrier is shown to have failed to negotiate in good faith or has violated the implementation schedule for the agreement. There is no evidence to suggest that either of these circumstances has occurred in Oklahoma.¹⁰

The exception to Track B deactivation carved out for violation of an implementation schedule reflects an understanding by Congress that implementation would occur over some period of time and that a carrier whose interconnection request is sufficient to trigger Track B deactivation would not, ipso facto, qualify as a carrier satisfying the requirements of Track A. The evident purpose of Section 271 (c)(1)(B) is to protect RBOCs from being "frozen out" from pursuing an in-region interLATA petition due to a failure to request access in a state by any facilities-based carrier that holds the promise of meeting the qualifications for a Track A petition. To conclude otherwise - as SBC does - twists the statutory language in a tortuous manner and to a completely illogical result, since the exception to Track B deactivation due to

⁹ SWBT has received a number of interconnection requests in Oklahoma from carriers other than Brooks, some of which may also qualify as facilities-based interconnection requests. In particular, Cox Communications recently announced the signing of an Oklahoma interconnection agreement with SWBT, and that request and agreement undoubtedly qualify as facilities-based.

¹⁰ The Brooks-SWBT Oklahoma's interconnection agreement does not contain a specific implementation schedule. In the absence of a specified schedule, Track B implicitly requires reasonable effort to implement the agreement at the earliest feasible time. Brooks contends that such delays as have occurred regarding implementation are primarily within the control of and therefore the responsibility of, SWBT.

implementation failure is rendered meaningless if a competing carrier's inability at any point to satisfy the Track A is construed as opening the Track B door.

The Oklahoma Corporation Commission's Administrative Law Judge - after reviewing all comments and hearing the testimony presented in the Oklahoma state investigation - issued an order containing detailed findings of fact and conclusions of law upon which he found significant deficiencies in SBC's current request for in-region interLATA entry. Directly relevant to the issues addressed herein are the ALJ's findings that Track B is not available to SBC in Oklahoma because "[t]here are several facilities-based providers and there are several others who have reached interconnection agreements or that have such agreements pending with SWBT"; and that Brooks is a qualifying facilities-based carrier for purposes of foreclosing a Track B Application. The ALJ also found that Brooks is not currently furnishing facilities-based residential service in Oklahoma. (Report and Recommendation of the Administrative Law Judge, Oklahoma Corporation Commission Cause No. PUD 970000064 at 35).¹¹

At open deliberations on April 25, 1997, the Oklahoma Corporation Commission voted 2-1 (Commissioner Anthony dissenting) to reverse the ALJ's Report and to recommend approval of SBC's Section 271 application to this Commission. No written decision has been issued by the Oklahoma Commission at this time. While it is the

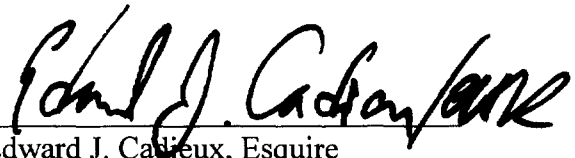
¹¹ The ALJ also found that SWBT currently fails to satisfy the "competitive checklist" in various respects. (*Id.* At 36.)

Oklahoma Commission itself which has the duty to consult with this Commission with respect to Section 271 applications, any such state commission consultation should be accorded such weight as may be appropriate. In these circumstances, it should be recognized that the Oklahoma evidence was heard directly by the ALJ sitting alone who, as discussed above, made detailed findings of fact and conclusions of law.¹² Moreover, the Commission must exercise its own judgment concerning matters of interpretation and application of federal law and its rules to the relevant facts.

¹² SWBT, for its part, went to great lengths in the state proceeding to insulate its supporting case from the scrutiny of opposing parties. SWBT was the only party to refuse to make the authors of its comments or testimony available for cross-examination, and SWBT blocked an attempt to use depositions as an alternative form of inquiry. Having successfully insulated its supporting case from scrutiny, SWBT then- at the April 23 appeal hearing - made an extraordinary and wholly improper attempt to have the Oklahoma Commission direct staff to meet privately with SWBT personnel at SWBT offices for the remaining days prior to this Commission's May 1 deadline for state consultation. The explicit purpose of these sessions was for SWBT's assertion that it is in compliance with the requirements of the competitive checklist, notwithstanding the ALJ's findings of fact and conclusions of law to the contrary. The Oklahoma Commission did not specifically accept or reject SWBT's offer on the record at the April 23 appeal hearing.

For all of these reasons, Brooks respectfully urges the Commission to grant the
ALTS Motion.

Respectfully submitted,

By: 
Edward J. Cadieux, Esquire
Director, Regulatory Affairs-
Central Region
Brooks Fiber Properties, Inc.
425 Woods Mill Road South
Suite 300
Town and Country, Missouri 63017
(314) 579-4637

April 28, 1997

CERTIFICATE OF SERVICE

I, Kimberly E. Thomas, do hereby certify that the foregoing **COMMENTS OF BROOKS FIBER PROPERTIES, INC. IN SURPPORT OF MOTION TO DISMISS AND REQUEST FOR SANCTIONS BY THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES** was mailed on this 28th day of April, via first class U.S. mail to the following:

William F. Caton, Acting Secretary *
Federal Communications Commission
1919 M Street, N.W. - Room 222
Washington, D.C. 20554

Larry Atlas *
Associate Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W. - Room 500
Washington, D.C. 20554

Chairman Reed E. Hundt *
Federal Communications Commission
1919 M Street, N.W. - Room 814
Washington, D.C. 20554

A. Richard Metzger *
Deputy Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W. - Room
Washington, D.C. 20554

Commissioner James H. Quello *
Federal Communications Commission
1919 M Street, N.W. - Room 802
Washington, D.C. 20554

Todd F. Silbergeld
SBC Communications, Inc.
1401 Eye Street, N.W.
Suite 1100
Washington, D.C. 20005

Commissioner Susan Ness *
Federal Communications Commission
1919 M Street, N.W. - Room 832
Washington, D.C. 20554

Michael K. Kellogg
Austin C. Schlick
Kellogg, Huber, Hansen, Todd & Evans
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005

Commissioner Rachelle B. Chong *
Federal Communications Commission
1919 M Street, N.W. - Room 844
Washington, D.C. 20554

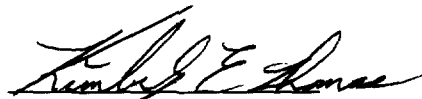
Don Russell, Chief
Telecommunications Task Force
Antitrust Division
US Department of Justice
Room 8104 Judiciary Center
55 4th Street, N.W.
Washington, D.C. 20001

Regina Keeney, Chief *
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W. - Room 500
Washington, D.C. 20554

Richard J. Metzzgaer, General Counsel
Association of Local Telecommunications
Services
1200 19th Street, N.W.
Washington, D.C. 20036

James D. Ellis
Paul K. Mancini
SBC Communications, Inc.
One Bell Center
St. Louis, Missouri 63101

* Hand Delivered



Kimberly E. Thomas